SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 18 | Issue

Article 42

January 1992

Discussion after the Speech of J. Christopher Thomas

Discussion

Discussion After the Speech of J. Christopher Thomas*

QUESTION, *Professor King*: Say, for example, that you have a country with virtually no environmental regulation, and another with very comprehensive environmental regulation. Should there be some means by which that discrepancy is adjusted in terms of equity and fairness for the producers of those products?

ANSWER, *Mr. Thomas*: There is no question that we have to recognize that, for certain industries, the cost of environmental compliance is a very significant cost of production. There are industries which will — all other things being equal — look at where it is best for them to locate if they can get away with lax environmental compliance. One thing we could do, if you have creative lawyering, is to say the absence of government regulation is a conferral of a countervailing subsidy.

Let's say that the furniture manufacturers of California have relocated to Mexico, and their principal reason for doing so is to take advantage of lower environmental standards. It may be that other furniture manufacturers in the U.S. would consider bringing a countervailing duty petition against imports of furniture into the United States on the grounds that it's subsidized by lack of government compliance. That's a possibly, but I would rather see what we have between Canada and the United States, which is — whether it's Great Lakes water, acid rain or transboundary rivers — an issue by issue addressing of the problem in the environmental context. I'm very concerned about establishing a dangerous principle which can be applied to many other areas of trade and many other types of internal regulation beyond the environment. Once we do that, we will run into the problem that the GATT panel identified, which is that it will take away negotiated rights of access and restrict the ability of a country to trade with another country by determining the relative commonality of their internal regulatory measures.

QUESTION, *Mr. Edwards*: In international trade in cultural property, we routinely look beyond the object itself; we want to know things behind the object in terms of who made it, when it was made, what happened, the processes it went through and so forth. Maybe a question that's arising here is whether we should treat tuna as a product, or whether we need to think of different ways of thinking about what a tuna fish is when it moves across the border.

ANSWER, *Mr. Thomas*: I don't think we disagree that the challenge right now is whether or not we should move away from the tradi-

* The questions and answers presented herein have been edited by the *Canada-United States Law Journal* for the purpose of clarity, and have not been edited or reviewed by the respective speakers.

tional focus of the GATT on performance characteristics of the product to the production process itself.

That's the critical question which is going to face us in the 1990s. If we do change our focus, I'm not sure that unilateralism along the lines of the U.S. Marine Mammal Protection Act is the right way to do it. I don't know much about the origins of that act, but I would like to think that if we make such a crucial decision, it's done after very extensive study. This is not an issue that we should open up in a cavalier fashion, and, with respect, it's not analogous to art, because it's too fundamental to the operation of the trading system to take what applies in a very narrow part of the spectrum and apply it across the board.

What I'm saying, in summary, is that if we really move from the product orientation of the GATT towards a production process, let's do it very carefully as opposed to doing it unilaterally — not just because it sounds good at the time, because we're concerned about dolphin welfare.

QUESTION, *Ms. Wilson*: Do you agree entirely with the principle of integrating economic and environmental considerations, or sustainable development, or would you want to see international trade exempted from that?

ANSWER, *Mr. Thomas*: I think that principle quite happily coexists with the rules of the GATT. One of the points I made earlier is that many people have argued that the GATT somehow controls a country's ability to control the pace of resource exploitation, for example, and there's nothing in the GATT that says that. If you want to take a natural resource such as a forest, or anything that even has been exploited already in part, and if you want to withdraw that from commercial exploitation, there is absolutely nothing anybody else can do under the GATT to challenge that. That is an internal decision made by a government which is beyond the GATT's scrutiny.

So, I think that many of the things that people are talking about in terms of sustainable development are consistent with the GATT system. The problem is really where we begin to use trade sanctions for environmental purposes; it's this intraterritorial versus extraterritorial distinction that is where the real uneasiness and the inconsistency between the different areas of thinking and regimes exist.

QUESTION, *Ms. Dallmeyer*: Do environmental conventions have to come back to the GATT for approval? In other words, what sort of trumping function does the GATT play?

ANSWER, *Mr. Thomas*: The GATT has no supernatural power. It is an agreement between sovereign states, and states are free to enter into other international agreements which would coexist with the GATT. In fact, in the *Salmon and Herring* case, Canada argued that its landing requirement on fish was justified and indeed could almost be said to be necessitated by Canada's international legal rights and obligations under the law of the sea, both customary and conventionalist, because Canada

is a signatory. The panel considered this to some extent, cognizant of the fact that there was another body of international law which imposed rights and obligations.

The GATT has no vetoing capacity with respect to international and environmental conventions, so if the world community wants to negotiate something where you ban the trade of certain substances, it's highly unlikely that any of the parties to that convention are going to challenge another contracting party's decision to abide by the terms of that convention. To be absolutely precise, we could clarify that trade sanctions taken pursuant to an internationally-accepted convention could be justified under Article XX.

QUESTION, *Mr. Brueckmann*: How might the GATT be adapted to some of these challenges? Can Article XX in any way be built upon or adjusted as a basis for addressing some of these difficulties? What about a new code outside of the GATT on the environment along the lines of what Senator Baucus has proposed? Finally, could the Standards Code already within the GATT framework have the potential to be elaborated upon in ways that might impose some disciplines on environmentally-based standards?

ANSWER, *Mr. Thomas*: I would concentrate on crafting an exception to Article XX, rather than dealing with the Standards Code. As to another environmental code, along the lines of what Senator Baucus has proposed, I don't see these negotiations being very efficacious in the GATT right now. We've missed so many deadlines in the GATT — in negotiations that were supposed to last no longer than four years, starting in September 1986 — that the idea of undertaking a major negotiation on a new environmental-trade code is a bit daunting to me.

I would rather see some concentration on the specific exception in Article XX. You need two-thirds of the contracting parties to agree to make that change, so it can be amended. It doesn't require unanimity like other parts of the General Agreement.

QUESTION, *Professor King*: What about the roles of bilateral negotiations between countries such as the U.S. and Mexico? How does our negotiating with Mexico on environmental matters relate to what is going to happen in GATT?

ANSWER, *Mr. Thomas*: I think those are largely different spheres of activity. A classic example is the Pacific Salmon Commission — the Pacific Salmon Treaty — to which Canada and the United States are parties. The two countries have created a very elaborate and quite efficacious bilateral agreement that has extensive consultative revisions and scientific underpinnings to deal with the management of the salmon resource off the West Coast. There is no GATT problem at all. Whether it's on a bilateral, trilateral or multilateral basis, what we ought to do is have the experts in the resource and the government departments that have the interest in the maintenance, conservation and preservation of

resource deal with that issue, largely beyond the realm of any GATT involvement.